IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 8021/2022

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: YES
12 DECEMBER 2022

In the matter between:

BLACKBERRY LIMITED	First applicant
BLACKBERY MOBILE SOUTH AFRICA (PTY) LTD	Second applicant
and	
CHRISTOPHER SHAUN DE BOD	First respondent
RICO WESSELS	Second respondent
THE SHERIFF OF THE HIGH COURT (PRETORIA (EAST)	Third respondent
ABSA BANK HOMELOANS GUARANTEE CO (RF) (PTY) LTD	Fourth respondent

THE CITY OF TSHWANE METROPOLITAN Fifth respondent

THE O[....] COUNTRY ESTATE HOMEOWNERS ASSOCIATION Sixth respondent

JUDGMENT

SWANEPOEL, AJ

Introduction

[1] This is an application by the first and second applicants to declare residential (immovable) property executable.

[2] It is common cause that the first and second applicants are the judgment creditors in respect of a judgment granted in their favour, by this Court on 23 July 2020 under Case No 50304/14, in terms whereof *inter alia* the first and second respondents are jointly and severally liable to the applicants, with a company known as Silver Meadow Trading 257 (Proprietary) Limited trading as Phat Concepts (the "company"), in the amount of R39 330 120.61 and interest at the rate of 15,5% per annum to be calculated from 17 April 2014 to date of payment.

[3] It is not disputed that the company is dormant and unable to pay any amount to the applicants.

[4] The application is brought under the rubric of Uniform Rule 46(1)(a)(ii). In addition, Uniform Rule 46A applies in circumstances where the applicants seek to execute against the residential immovable property of the judgment debtors, the first

and second respondents.

[5] The immovable property of the first and second respondents sought to be declared executable is described as Erf [....], B[....] Extension 3, Registration Division J.R., Pretoria, held under Deed of Transfer with number [....]. The immovable property is situated at No [....] C[....]Street, O[....], No [....] A[....] Street, O[....], Pretoria. I will refer to this property as “the immovable property”.

[6] It is common cause that, to date, the judgment debt remains unpaid. Only the first and second respondents opposed the application.

The first and second respondents

[7] The first and second respondents were the only directors and shareholders of the company. They have, as they were entitled to in terms of Uniform Rule 46A(6)(a,) elected to oppose the application. The main answering affidavit was deposed to by the first respondent. The second respondent deposed to a confirmatory affidavit.

[8] Pursuant to attachment and later release of movables situated at the immovable property (with a nominal value of some R11 300) and other attempts on behalf of the applicants to attach shares of the first and second respondents in a private company, the Sheriff (cited as third respondent), rendered *nulla bona* returns of execution in respect of the first and second respondents.

[9] It is on the basis that the first and second respondents are unable to satisfy the judgment debt that the applicants seek an order that the immovable property be declared executable. In the applicants’ notice of motion and founding affidavit (deposed to on their behalf by their attorney of record), the first and second respondents’ attention was directed at the provisions of s 26(1) of the Constitution of the Republic of South Africa (1996).

[10] The applicants have stated in their founding affidavit that the first and second

respondents are adult businessmen born in 1976 (first respondent) and 1974 (second respondent). Although, in respect of the allegations contained in paragraph 7.7 of the applicants' founding affidavit the first and second respondents indicated that the content of the paragraph is denied, the first and second respondents have not gainsaid the correctness of their identity numbers and have failed to provide any particulars of their current status of employment and means of income.

[11] It is common cause that the immovable property is the primary residence of the first and second respondents.

Alternative means of satisfying the judgment debt

[12] In considering alternative means by the first and second respondents of satisfying the judgment debt, other than execution against the immovable property, the following considerations are relevant:

(a) In the first respondent's answering affidavit a tender was made to pay an amount of R2 500 (Two Thousand Five Hundred Rand) per month towards the judgment debt. It was offered that payment of the amount of R2 500 per month towards the judgment debt *"can be revised annually between the Applicants and Respondents"*.

(b) The first and second respondents have not provided evidence confirming that any payment(s) had been made pursuant to their tender. This, despite the fact that their answering affidavits were commissioned on 14 March 2022 and this application was argued in Court in October 2022.

(c) It was stated in the answering affidavit that *"[i]t is envisaged that the Applicants will receive the VAT refunds from SARS as a result of the reversal of the VAT invoices"*. This is in relation to the first and second respondents' allegations that they have been engaging the South African Revenue Service ("SARS") since the judgment debt had been obtained by the applicants and the

first and second respondents *"had the invoices reversed"*. In addition, it is asserted in the first and second respondents' answering affidavit that these refunds must be paid to the other judgment debtor, the company, *"in the region of* [sic] *between R4 500 000 to R5 000 000"* and that *"[t]his amount will be the property of the Applicants"*.

(d) As (correctly) pointed out by counsel on behalf of the applicants, the information in relation to the purported value-added tax ("VAT") refund that may become payable by SARS to the company, is scant. The first and second respondents have not made reference to any documentation in support of the allegations contained in their answering affidavits. I accept, in considering the allegations contained in the first respondent's answering affidavit in relation to VAT refunds, that the asserted refunds will become payable to the company (Silver Meadow Trading 257 (Proprietary) Limited trading as Phat Concepts). It is this company that the first and second respondents were the sole shareholders and directors of and against which the applicants obtained judgment in this Court on 23 July 2020 under Case No 50304/14 in terms whereof the first and second respondents are jointly and severally liable with the company to make payment to the applicants in the amount of R39 330 120.61.

(e) Save for what is stated above, the first and second respondents have failed to state any other means of satisfying the judgment debt.

[13] I am satisfied that the applicants have shown that no alternative means exist of satisfying the judgment debt other than execution against the first and second respondents' immovable property. The first and second respondents have not provided any evidence to the effect that they will be able to satisfy the judgment debt, or a substantial portion thereof. On a consideration of all the evidence it cannot be gainsaid that to date the judgment obtained by the applicants against the first and second respondents amounts to a pyrrhic victory and this situation will remain unless the immovable property is declared executable. Even if the asserted VAT refund amount is

to be paid to the applicants and payments are made in terms of the tender by the first and second respondents that would have a minor effect on the outstanding capital of the judgment debt.

The bases of opposition

[14] In the answering affidavit deposed to by the first respondent, two main bases of opposition were alleged. First, that the applicants have unlawfully terminated the agreement between it and the company, which has caused the first and second respondents financial and reputational damage. Second, the opposing respondents rely on allegations to the effect that they occasionally look after a minor child (10 years old) who is not ordinarily resident with the first and second respondents and who allegedly has the Cri-du-chat syndrome (a rare genetic disorder due to a partial chromosome deletion on chromosome 5, which affects growth and development).

[15] I agree with the applicants' counsel that the asserted unlawful termination of the agreement between the applicants and the company bear no relevance to the present application. It was not denied by the first and second respondents that the applicants obtained judgment against them for payment as aforesaid. That judgment remains extant and enforceable. The first and second respondents never sought to rescind the judgment. It is relevant to consider the curious nature of the opposition by the first and second respondents in this respect. They have not stated any particulars of the alleged unlawful termination of the agreement between the applicants and the company. The first and second respondents have failed to take this Court into their confidence by revealing the nature of their current employment or whether at present they conduct any business activities. In addition, they have failed to provide any documentation or information in relation to their current financial position. This, despite being invited to do so by the applicants in their replying affidavit.

[16] Therefore, the first and second respondents' attempted reliance on the alleged unlawful termination of the agreement between the applicants and the company does not assist them in their opposition of the relief sought in the present application. The

allegations contained in the first respondent's answering affidavit (in relation to the alleged unlawful termination by the applicants of the agreement with the company) do not constitute a valid ground(s) of opposition against the relief sought by the applicants. The allegations contained in the first respondent's answering affidavit are wholly insufficient to constitute "relevant factors" as contemplated in Uniform Rule 46A(2)(b). The subrule contains an injunction to the effect that a Court shall not authorise execution against immovable property which is the primary residence of a judgment debtor unless the Court, having considered all relevant factors, considers that execution against such property is warranted.

[17] As regards the situation relating to their godchild (10 years old and born with the rare genetic disorder aforementioned), the following were stated by the first and second respondents:

(a) That *"[T]he property is currently occupied by the Respondents, together with frequent and long-term visits by their godchild …"*.

(b) That the respondents are a *"support system"* to the minor child.

(c) That the respondents have been part of the minor child's life since he was born and diagnosed.

(d) That the respondents *"regularly look after"* the minor child *"should his parents need to travel for any reason or his medical treatments in Pretoria"*. It is alleged that the minor child's mother relocated to L[....]*"where his therapies are limited"* and that the respondents *"continued to act as a base for monthly visits in order to facilitate his Occupational, Speech and Physiotherapies"*. It is further alleged that all of these therapies are *"located in close proximity to the property"* and that, in order for him to attend all his required therapies, the minor child *"would stay with the Respondents for at least one (1) week during the month, or such longer period as may be required"*.

(e) That *"[I]t may be required that* (the minor child) *stay with the Respondents for longer periods at a time"*.

(f) That the minor child's ongoing care and development constitute a key factor in the maintenance of a stable and consistent routine, process and environment.

(g) That the minor child has his own room at the immovable property that has been arranged to *"synergize with the level of sensory processing that he should be at"* and that his dedicated space includes items like *"Astro-turf on the floor for him to be able to feel the textures and inputs as he spends most of his time on the floor, textured toys and gadgets, fine motor-skilled development games and activities"* and that it is his *"safe space"*.

(h) That, should the immovable property be sold, *"it would cause irreparable harm towards* (the minor child) *and his family and the treatments he receives, and assistance provided by the Respondents to his family"*.

[18] Despite the allegations contained in their answering affidavit it is important to consider the fact that the first and second respondents have included no confirmatory evidence (in respect of the needs of the minor child and the asserted necessity that the immovable property be used to host the minor child from time to time) as part of their answering affidavit. The evidence of the minor child's mother and/or father has not been obtained. No evidence in confirmation of the medical state of the minor child has been provided. I accept [as was held in *Firstrand Bank Ltd v Folscher and another*, *and Similar Matters*, a judgment by the Full Court reported at 2011 (4) SA 314 (GNP), at 332C-333D] that the position of a debtor's dependents and other occupants of the immovable property sought to be declared executable must be established and constitute legally relevant considerations. However, the first and second respondents have not made out a case to the effect that they are the primary caregivers of the minor child. The first and second respondents have not shown that, even if it is to be accepted that the minor child would be required to reside with them for one week per month going forward, no alternative

accommodation can be obtained by the minor child's parents for and on his behalf. On the first and second respondents' own version the minor child is not a permanent occupant of the immovable property. It is further not the first and second respondents' case that they are under any legal obligation to provide temporary housing to the minor child or that they are legally required to provide care and maintenance to the minor child in any manner whatsoever.

[19] Based on the facts of the matter this Court cannot regard the alleged medical condition and circumstances of the minor child as a relevant factor in determining whether execution against the immovable property is warranted. Even if all the allegations contained in the first respondent's answering affidavit (in relation to the minor child) are to be accepted, it remains that the first and second respondents are not the primary caregivers of the minor child, and it has not been established that future temporary accommodation in Pretoria cannot be arranged by the minor child's parents. In this regard it is important that the first and second respondents have not, in their answering affidavits, explained the absence of any confirmation in relation to the asserted needs of the minor child, particularly insofar as it concerns the need to be housed at the immovable property in future.

Immovable property value

[20] In the applicants' founding affidavit reliance was placed on the City of Tshwane's municipal valuation of the immovable property in the amount of R2,9 million. The first and second respondents however stated that the immovable property was valued at R2,7 million (market value) and that a forced sale value of R2,3 million applies. In this respect reliance was placed on a valuation report and certificate dated 15 December 2021, issued by Ubusisiwe Real Estate Solutions (Pty) Limited, under hand of one R Monteiro, a professional associated valuer. The first and second respondents did not, in their answering affidavits, allege that the applicants failed to attach documents to their founding affidavit in support of "*the market value of the immovable property*" as contemplated in Uniform Rule 46A(5)(a). This, despite the injunction in Uniform Rule 46A(6)(c), that "*every opposition or submission referred to in paragraphs (a) and (b) shall be set out in*

an affidavit". Paragraphs (a) and (b) of subrule (6) of Uniform Rule 46A provides *inter alia* for submissions to be provided which are relevant to the making of an appropriate order by the Court and for the reasons for opposing the application and grounds on which the application is opposed to be set out in an answering affidavit. However, the first and second respondents' heads of argument dealt extensively with the alleged failure, by the applicants, to attach a "sworn valuation" to their founding affidavit in the present application.

[21] In my view the applicants have complied with Uniform Rule 46A(5), including the provision of documents (as part of the applicants' founding affidavit) evidencing the market value of the immovable property and the local authority valuation thereof. At the time when the application was instituted the applicants did not know whether the immovable property constitutes "*the residential immovable property of a judgment debtor*" as contemplated in Uniform Rule 46A(1). This much was stated on behalf of the applicants in their founding affidavit. The applicants stated that the immovable property was purchased for an amount of R2,7 million on 17 March 2017. This was not disputed. The applicants have stated in their founding affidavit that *"[T]he current market value of the property is approximately R2 900 000.00 based on the municipal valuation and the recent sales of properties as appears from annexure FA2"*. Whilst this allegation was denied, the first and second respondents' version included their reliance on the comprehensive valuation of the immovable property in the amount of R2,7 million (market value) and R2,3 million (forced sale value). In the circumstances it is evident that the applicants have not failed to comply with the injunction contained in Uniform Rule 46A(5)(a) and/or (b). Manifestly, the applicants included supporting documentation as part of their founding affidavit evidencing the market value of the immovable property as well as the local authority valuation thereof. I agree with counsel for the applicants' submission that the subrule does not require an applicant to include "a sworn valuation" of the immovable property forming the subject matter of an application to declare immovable property executable. Even if I am wrong in this respect, it is clear that any dispute between the parties that may be said to exist in relation to the market value of the immovable property is focused on the so-called forced sale value determination thereof.

Having regard to the documentary evidence presented by the parties, I did not consider it necessary to call for any other document(s) to be provided, by any of the parties, in relation to the determination of the market value or the municipal value of the immovable property.

[22] In the circumstances and regard had to the allegations contained in the applicants' founding affidavit, read together with the documentation attached thereunto, it is unnecessary for this Court to consider whether to condone any failure by the applicants to provide any document referred to in subrule (5), as contemplated in Uniform Rule 46A(8)(c). Simply put, the applicants have not failed to provide any document(s) as contemplated in subrule (5) to Uniform Rule 46A.

[23] I am mindful of the requirement to ameliorate the risks and devastating effects involved in the sales of residential property, in execution, for prices that are not market related. In terms of Uniform Rule 46A(9)(a) this Court must consider whether a reserve price is to be set. This Court is enjoined to take into account the market value of the immovable property in deciding what a fair reserve price would be (see in this respect the judgment in *Nedbank Ltd v Mzizi and Two Similar Cases* 2021 (4) SA 297 (GJ) at paras [3], [16] and [20]). The following considerations are relevant and are taken into account:

(a) The market value of the immovable property (I place reliance on the market value obtained by the first and second respondents).

(b) The amounts owing as rates or levies by the first and second respondents in respect of the immovable property (there appears to be no dispute between the parties that the first and second respondents' monthly levy has been paid; this is so despite the first and second respondents' denial, in paragraph 45 of the main answering affidavit, of the allegation contained in paragraph 8.4 to this effect in the applicants' founding affidavit). The first and second respondents did not take issue with the evidence provided by the applicants that, as at 19 October 2021, the first and second respondents owed the City of Tshwane an amount of R2 392.99 in respect of rates and taxes.

(c) The amounts owing on registered mortgage bonds (on the first and second respondents' own version the outstanding bond on the immovable property is the amount of R2 318 321.09).

(d) Any equity which may be realised between the reserve price and the market value of the property.

(e) Reduction of the first and second respondents' indebtedness on the judgment debt amount, and whether or not equity may be found in the immovable property as referred to in subparagraph (iv) of Uniform Rule 46A(9)(b).

(f) Whether the immovable property is occupied, the persons occupying the property and the circumstances of such occupation.

(g) The likelihood of the reserve price not being realised and the likelihood of the immovable property not being sold.

(h) Any prejudice which any party may suffer if the reserve price is not achieved.

(i) Any other factor (which in the opinion of the Court is necessary) for the protection of the interests of the execution creditors (the applicants) and the judgment debtors (the first and second respondents).

Additional considerations & conclusion

[24] The first and second respondents have not alleged that they will not be able to obtain alternative accommodation. It was also not alleged with reference to supporting evidence that it is likely that a reasonable reserve price would not be realised at a sale in execution of the immovable property.

[25] The first and second respondents have made an alternative "request" in their answering affidavit (secondary to their contention that the application ought not to be granted). They request that a minimum price be set in the amount of R2 318 321.09, and that the immovable property be placed in the open market for sale in an amount of R2,7 million for a period of six months which period will *"also assist the Respondents to prepare (the minor child) with the sale of the property and changes that will occur"*.

[26] I am satisfied, considering the evidence of record, that execution against the immovable property is unavoidable and warranted. This is so despite the fact that the immovable property is the primary residence of the first and second respondents. Save for the allegations in respect of the VAT refund and the tender to make monthly payments no evidence was presented of any alternative means by the first and second respondents of satisfying the judgment debt.

[27] The interest of the mortgagee, the fourth respondent, as well as the interests of the first and second respondents require that a reserve price be set. This Court's power and duty to impose a reserve price is founded, *inter alia*, in s 26(3) of the Constitution of the Republic of South Africa, 1996. Consideration whether to set a reserve price (based on the relevant market value, municipal value and evidence in relation to a probable forced sale value of the immovable property) constitute a relevant factor when declaring a property specially executable at the behest of a judgment creditor(s). In terms of s 1 of the Constitution, there is an obligation on all to promote the value of human dignity, the achievement of equality and the advancement of human rights and freedoms which would include the application of the provisions of s 26 of the Constitution by a Court, having regard to all the relevant circumstances, before sanctioning the process that may lead to the ultimate eviction from a home. The facts of this matter reveal that, even if a reserve price is set in an amount above the outstanding bond amount payable by the first and second respondents, and even if equity pursuant to a sale in execution is yielded (for the benefit of the judgment creditors), there would continue to exist a disproportionality between that equity amount (payable pursuant to a sale in execution to the applicants) and the outstanding judgment debt amount. However, it cannot be

gainsaid that if a sale in execution is to take place, subject to a reserve price, such would provide for at least a substantial amount of money to be paid to the applicants in their capacity as judgment creditors. In my view (bearing in mind the evidence presented by the parties) the amount of R2 600 000 (Two Million Six Hundred Thousand Rand) is a fair and reasonable reserve price.

[28] In my view it would be just and reasonable to order that the sale in execution of the immovable property may only be held after 01 March 2023 to afford the first and second respondents an opportunity to obtain alternative residential accommodation. There is no reason why the first and second respondents should not be ordered to pay the applicants' costs of the application.

Order

[29] In the circumstances an order is granted in the following terms:

1. The immovable property described as Erf [....], B[....] Extension 3, situated at [....] C[....]Street, O[....], [....] A[....] Street, O[....], Pretoria, and held by the first and second respondents under Deed of Transfer with number [....](“the immovable property”) be and is hereby declared specially executable;

2. The Registrar of this Court is instructed and authorised to issue a writ of execution in respect of the immovable property, substantially in compliance with Form 20 of the First Schedule to the Uniform Rules, and the third respondent be and is hereby instructed and authorised to attach the immovable property in execution and thereafter to serve notice of the attachment and give notice and advertise the immovable property for sale in execution and take all steps necessary in accordance with the provisions of Uniform Rule 46;

3. A reserve price is set for the sale in execution of the immovable property in the amount of R2 600 000 (Two Million Six Hundred Thousand Rand);

4. A sale in execution of the immovable property may only be held after 01 March 2023;

5. The applicants' costs of the application are to be paid by the first and second respondents, jointly and severally, the one paying the other to be absolved.

PA SWANEPOEL
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: **10 October 2022**
Date of judgment: **12 December 2022**

Appearances:

Counsel for first and second applicants:	Adv. R Bekker
Attorneys for first and second applicants:	Cox Yeats Attorneys Ref. Mr G Pritchard
Counsel for first and second respondents:	Adv. M van Niekerk

(heads of argument prepared by Adv J Scheepers)

Attorneys for first and	
second respondents:	Hills Inc.
Ref.	Mr A J Bennecke